U.S. Department of Labor

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Issue date: 31Dec2001

Case No.: 1999-LHC-2044
OWCP No.: 02-121776

In the Matter of:
DONALD T. PATTERSON,
Claimant

vs.

OMNIPLEX WORLD SERVICES,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:
Thomas W. Lipps, Esq.
Algona, Iowa
For the Claimant

Keith L. Flicker, Esq.
New York, New York
For the Employer/Carrier

Karen Mansfield, Esq.
Chicago, Illinois
For the Director

Before: **THOMAS F. PHALEN, JR.**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, et seq.), herein referred to as the "Act," as extended to cover certain employees under the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. § 2105(c) and § 8171, et seq., and 43 U.S.C. § 1331, and the governing regulations thereunder. It was filed on December 7, 1999, by Donald Patterson, Claimant, against Omniplex World Services, Employer, and the Director of Workers' Compensation Programs, (OWCP), Party-in-Interest. The hearing was held on October 11, 2000, in Chicago, Illinois, pursuant to a revised notice of hearing dated April 27, 2000, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were requested and have been made a part of the record herein. This decision is being rendered after having considered the entire record, which includes the testimony, the exhibits and the post-hearing briefs.[1]

Stipulations[2]

The parties stipulate, and I find that**:**

1. The Parties are subject to the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act.

2. The claimant and the employer were in an employee-employer relationship at the time of the accident/injury.

3. The accident/injury arose out of and within the scope of employment.

4. The accident/injury occurred on August 10, 1997.

5. The employer was advised of or learned of the injury on August 10, 1997.

6. The Employer was timely notified of Claimant's injury.

7. The Employer filed a first Report of Injury (Form LS-202) with the United States Department of Labor on August 10, 1997.

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[1]Subsequent to the hearing in the above matter, a motion to reopen the record was filed by the Respondent, which resulted in an order to show cause being issued to the Complainant concerning his employment as a guard in Tanzania. After considering the positions of the parties, on February 9, 2001, the undersigned issued an order denying the motion to reopen the record, recognizing that the events could result in a request for modification of any award made herein.

[2]The following references will be used: "T" for the official hearing transcript, "ALJX Ex." for Administrative Law Judge exhibits, "JX" for Joint Exhibits, "CX" for Claimant's Exhibits, and "EX" or "RX" for Employer's/Respondent's Exhibits.

8. The Claimant filed a claim for compensation Form LS-203 with the United States Department of Labor on December 7, 1998.

9. Claimant filed a timely notice of Claim.

10. Employer filed a timely Notice of Controversion (Form LS-207) on September 11, 1998.

11. Disability payments have been made as follows: the amount of $25,386.22 was submitted and withdrawn at the hearing, and reconfirmed in a letter of November 9, 2000, from Claimant's counsel, and is accepted as the final, total figure for benefits paid by the employer as temporary total disability for the period 8/11/97 - 9/16/98. (CX 32)

12. Employer filed a Notice of Final Payment or Suspension of Compensation or Payments (Form LS-208) on September 11, 1998.

13. All reasonable and necessary medical payments have been paid by the employer.

14. Claimant's "usual employment" consisting of his regular duties at the time of the injury as determined under Section 8(h) of the Act was as follows: Security Guard.

15. Claimant has not returned to his usual employment with the Employer since the date of the injury.

16. Since the date of the accident/injury, the work and earnings record of the Claimant is as follows:

The Claimant worked for Coastal International Security, Inc., and [its] successor Heritage Services, Inc. as a cleared American Guard from approximately late February 1999 through approximately June 1999, during which time he received compensation in the total amount of $11,959.07. (JX 1)

Issues

1. The Claimant's average weekly wage at the time of the accident/injury is in dispute.

2. The parties are in dispute as to whether for a one-year period immediately prior to the accident the Claimant was a five-day or six-day-per-week worker. The parties are also in dispute as to whether Section 10(c) of the Act should apply in this case.

3. The parties are in dispute as to whether the date of maximum medical improvement from the Claimant's injury was January 26, 1998, or a later date.

4. The parties are in dispute as to whether Claimant has demonstrated a causal relationship between his alleged disability and his work accident.

5. The following issues are to be resolved at trial: a) the Claimant's average weekly wage at the time of the accident; b) the nature, extent, and causation of any continuing disability on the part of the Claimant; c) and, the Employer's entitlement to relief under Section 8(f) of the Act.
(JX 1)

Summary of Findings

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's symptoms of back injury from the August 10, 1997 accident, and that he filed a timely claim for compensation. This court further finds that he suffers from a "disk injury" to his low back as a result of that accident, and that he is entitled to an award of temporary total disability benefit payments from that date until January 26, 1998 and permanent total disability compensation benefits, therefore, with medical benefit payments, as a result of the injury arising out of and suffered in the course of his employment.

Findings of Fact

Testimony:

Donald Patterson:

The Claimant, Donald Patterson, was born on February 22, 1950. (T 31) He is now age 51.

Mr. Patterson has an 11th grade education, with a GED degree completed later. His parents were farmers, and he grew up doing farm work. He worked on farms until 1979, when they moved to Boise, Idaho, where he went to work for a vending company. He got into construction for an insurance company dealing with fire and water damage, and then into security with D&L Security in Dallas, Texas. He also did housing construction. (T 70-71)

Mr. Patterson confirmed on cross examination that his first security job was in Mozambique, for MVM Security, from October 1990 through January 1991, similar to later jobs in Nigeria and Moscow, leaving at the end of the contract, at which time he was transferred to Pretoria, South Africa. He then traced his return back to work in Washington, D.C. and then to Santiago, Chili, followed by a return to Dallas, Texas, where they were living in 1991. In 1992, they moved to Trenton, Missouri, where his wife had relatives. The actual move by his wife to Missouri took place while he was in Chile. Following Chile, he was home for a period of time and then went to Almar Ata, Kazakhstan for three months, returning in February 1993. He was then assigned to Moscow for MVM in 1993 for the first time. After Moscow, he proceeded to Kiev, Ukraine, and then returned to the States. In 1995 he went to Helsinki, Finland for a year until 1996. Several of the last moves were as a security guard for MVM. (T 95-100) After this, he returned to the U.S. and found work as a security guard in Milan,

Missouri at a premium standard food store at the rate of $5.00 per hour, and a distance of 30 miles. (T 101)

Claimant entered into an employment agreement with Omniplex in July 1996, originally effective from September 19, 1996 through September 19, 1998.

In July 1997, he received the Omniplex assignment in Moscow, after a two-week training program in the Washington, D.C. area in April 1997. (T 101-106, CX 21)[3] While he had been required to restrain people in former positions, that had not been required of him at Omniplex facilities, and he had not performed any heavy work for that company. However, he has had training in restraining people, and has had to maintain a certain level of physical competence in the job. He is trained in riot control and self defense, but has not had to use that training. (T 36-37) However, until the date of the hearing, his work was limited to that stated in stipulation 15.

Claimant was injured on August 10, 1997, at the Omniplex protected United States Embassy warehouse in Moscow, which was then under construction. (T 32-33) The injury was suffered when he fell over a piece of rebar sticking out of newly poured concrete, approximately 12 - 14 inches, while performing his duties as one of two security guards on duty, on the night shift at the warehouse. There were another 3 or 4 on duty on another floor. (T 34-35)

Prior to the injury to his back on the night in question, he had not had any prior injuries, nor any injuries to his back. (T 37) On the night in question, and, apparently for several preceding it, the lights would go on and off, slowly coming back on. They were having such a problem with the lights the night of August 10, 1998, and he did not see a piece of rebar sticking out of the concrete. As he tripped over it, he twisted his back and fell onto his hands and knees. When he tried to get up he had pain in his lower back, increasing and running down his leg. He crawled to a standing position, putting his hands on his knees, thighs and waist, while slowly standing up. He got on the radio and called the other security officer, telling him what had happened, and that his back was hurting extremely bad. He went to the security office, took some muscle relaxants, Ibuprofen and Tylenol, wrote out an incident report, finished his shift inside the office, tried to make a "round" about ½ hour before the shift ended, and left. (T 39-40)

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[3]It appears that Mr. Patterson spent most of 1996 until April, 1997 in the U.S. living in Trenton, Missouri. The Omniplex documents reveal that on July 18, 1996 Mr. Patterson was offered the Moscow employment as a Project Phoenix Guard at the rate of $14.57 per hour, subject to meeting certain conditions and signing the attached Overseas Employment for a two year assignment in Moscow, Russia. One of the conditions was that he be able to attend two, forty-hour training sessions from Omniplex and the Department of State, and be able to "deploy within two weeks of being notified of an available position." (CX 21, p.p. 3-4) The attached draft agreement was dated July 18, 1996, and had a term of September 19, 1996 through September 19, 1998, with provisions for altering the dates. (CX 21, p.p. 5-6) Other provisions for travel reimbursement, per diem while in travel status and transportation of personal belongings and a completion bonus were also provided. (CX 21, p. 6) On July 28, 1998, he signed a second agreement, on or about the date of commencement of his Moscow assignment, which was for 2 years until July 27, 1999. (EX S)

The next night, while working at the far end of the warehouse, he tried to put his weight on his right leg, standing "like a horse" in a straight position, to run the scanner for the bar code used to electronically log locations inspected on his rounds. He turned to his left, put his weight on his left leg, and "immediately collapsed to the ground with severe burning sharp pains in my lower back, numbness, and needles and pins the entire length of my left leg." He confirmed, in response to a question from the undersigned, that he had not had any injuries other than that of the night before. After laying there for 35-40 minutes, other security officers arrived from the main camp at the embassy, loaded him onto a fireman's gurney, and took him to the American Medical Clinic in Moscow. When they arrived at the clinic, the attending doctor had gone to the Zil Hospital, a Russian hospital in Moscow, so he was again transported to that location. There, he finally had an x-ray of the lower back, showing no broken bones, but he was admitted for eleven days. His only movement was to the bathroom and back. He continued to have quite a bit of lower back pain, shooting pain in his leg which would come and go, numbness, needles and pins in the left leg and foot. He was receiving two injections a day of steroids and novocaine, directly into his lower back. (T 41-47)

Finally, he was transported to Kansas City, laying flat on a board mattress installed across seats of a commercial airline, and accompanied by a Russian doctor. From there he ended up in St. Joseph, Missouri, at the Heartland Regional Health Center, under the care of Dr. Mujica, who initially recommended surgery. After further MRIs and x-rays, (the initial ones in Moscow having "disappeared," including notes) a herniated disc was shown in his lower back, with twisted vertebras, and the surgery was set up by Dr. Mujica. On the evening before the surgery, he learned, apparently through his wife, that a nurse from Work Comp had cancelled it, suggesting that he contact another doctor, and resulting in another transfer to North Kansas City Hospital. There, Dr. Ebelke stated that he did not feel that surgery was necessary at that time, and he transferred him to a Dr. Fishman, on August 25, 1997. He was discharged by him, and told to start a physical therapy program, apparently starting in Trenton, Missouri for a week, then continuing at Health South, in St. Joseph, Missouri. (T 47-52)

Claimant continued his physical therapy from September 1997, until later in the year, and Dr. Fishman declared his date of maximum medical improvement to be January 26, 1998, although he was still experiencing symptoms of shooting pain in his leg which would come and go, numbness, needles and pins in the left leg and foot. The pain has continued to the present time, becoming what it was at the time of his injury. He compares the back pain to a "jab ... with a sharp pin, " then running down his leg as described above, to his foot, with numbness thereafter. He can drive for an hour at a time, then has to get out and stretch for 10 - 15 minutes. When he walks any distance, a block and a half, it flares up, with pain in the low back, legs and foot, as described. He limps, cannot run, and has trouble climbing stairs. He can reach but cannot lift anything off from a shelf without pain. Lifting is extremely difficult, with a limit of 10 lbs. Sitting on hard chairs is difficult. He has trouble sleeping, repeatedly rolling, tossing, and getting up and down. Dressing, putting on pants, socks and shoes are difficult. He ingests muscle relaxants, including Formula 303s, Ibuprofen and Doane's Pills, and applies Biofreeze. (T 53-58)

After his January 28, 1998 MMI, Mr. Patterson did look for work in Trenton, Missouri, going to Work Force near the Trenton college. He had hoped to work for Omniplex another year, then retire from working over seas, and then find a job locally, so that he could be with his family. (T 59-61)

Claimant's Exhibit 15, Mr. Patterson's job search log, shows the places that he searched for jobs in the Trenton area without success. Pages 1-6 include places that he had looked. Pages 7-27 are places filled out by Ron Miller, with the Department of Labor (uncertain as to Federal or State.) Despite mailings to all of them, and visits to several, he was unable to find work at any of those locations. (T 62-65)

A Mr. Combs had prepared a labor market survey prior to the hearing for Omniplex, which was given to him at his deposition. He applied to several places cited therein, including Hope Haven, for handicapped personnel; Matino Cycle, a motorcycle shop where he applied three times; a Super 8 Motel, working on a computer (he is computer illiterate); Frost Automotive, Casey's General Store, and Wal-Mart for a telephone answering position; Dollar General Store, and Place's Discount Store, with no results from any of them. He looked for work as far away as 35 -40 miles from Trenton. (T 66-69 & 71)

Due to his back condition, Mr. Patterson testified that he would be unable to perform any of those jobs physically that included farm work, or construction work such as plumbing and carpentry work. There are construction and farm jobs in the area, but no jobs without restrictions. He could not do the kneeling, bending and crawling that would be required for those jobs, and farm work is much like construction work, both requiring a lot of heavy lifting, carrying and riding equipment across rough ground, which he cannot do. (T 71-73)

On August 17, 1998, Omniplex offered Mr. Patterson two positions, one in Fort Wayne, Indiana at $6.40 per hour, and another in Washington, D.C. for $11.20 per hour, which were communicated to him by Ron Combs. Neither had relocation allowances, or room and board, as opposed to the Moscow security job that had both. (T 73-75; CX 18) Mr. Patterson testified that he and his wife both have a number of family and personal ties to the Trenton, Missouri area, and do not wish to move from there. At the time of the hearing, they were purchasing a house there, which would cost $250.00 a month, which they could not afford at $6.40 per hour in Fort Wayne, and where his wife would have to give up the job that she has. (T 76-77) Consequently, he declined those two jobs. (CX 19)

When Claimant left the Moscow job, he was earning $14.57 per hour, plus a travel allowance. (T 79) His last pay slip before his injury showed him working 76 hours from July 31, 1997 to August 31, 1997, with his last day of work being August 10, 1997 - a total of 10 days. (T 80)

Claimant's duties as an Omniplex Security Guard included detention of suspects, as well as apprehension of them, rapid response and jogging, walking up to two hours, and dragging an individual to safety, which he could not do at the time of the hearing. These are the same conditions as other jobs

in the description, such as climbing 70 feet on scaffolding, bending, crawling, working a 12 hour shift and shoveling snow. (T 81-84, CX 25)

In February 1999, he testified that he was forced financially to go to work for Coastal International and went to work in Nigeria performing security job work, at $10.50 per hour under Coastal, and received a raise to $12.50 per hour in April 1999, when Heritage took it over. They provided per diem, living expenses and a place to stay. He still had back pain with back massage needed two times a week at $40.00 each. The job in Nigeria was 10 times easier than Moscow, with two guards doing 15 minute patrols per hour. (T 73 & 84-86)

On return from Nigeria, Mr. Patterson was putting gas and oil in a chain saw to cut down a tree, when a branch fell on his head, without his knowing about it until he gained consciousness three days later. There was no injury to his back. He admitted to having used the chain saw about one month before that, but none that day. He denied falling out of a tree, as stated in one St. Luke's Hospital report, without contradiction. (T 87-92; CX 7, p. 4)

Mr. Patterson confirmed that on Respondent's medical records (RX Q), dated April 3, 1997, p. 128, in the first column, number 4: "back trouble," he checked "yes." He also stated that there was another page to that which stated something in addition, he had written: "minor back problems." This related to a seventh grade accident that had been classified as a broken neck. He stated that it did not relate to his lower back, and additional markings to the same medical exhibit where it stated in Nos. 27 - 28, "Paralysis, weakness, arms, legs; numbness, arms, legs," was also marked which he stated were in connection with his neck, but then it did not relate to his lower back. He stated that when he started the Omniplex contract, the only thing he had was "minor aches and pains." (T 108-111)

Mr. Patterson also confirmed that he had been rejected for insurance by the armed forces because of his physical condition, because of scar tissue on his lungs and the fact that he had had a broken neck. (T 111-112)

Mr. Patterson testified that he attended the Hensons Chiropractic Clinic from September 1994 through November 1995, and that he has continued to see a chiropractor at the Hensons clinic in Trenton. He denied that any adjustments were for his low back, but included his arms, shoulders and neck. Mr. Patterson admitted a possible adjustment to his low back in September 1994, but did not recall it. He denied missing work prior to his Omniplex position due to low back problems. (RX P, p. 116, T 112-114)

During the last weeks at Omniplex, Moscow, he worked 96 hours in two weeks at straight time pay, by contract, (EX P) continuing after 80 hours. (He worked 20 hours from July 28th to 31st and 76 hours in August from the 1st through the 10th. CX 22) He lived in a "man camp" housing area supplied by the employer and was provided meals at the mess hall there. He also received travel expenses. (T 116-118)

Mr. Patterson recounted the visits to the American clinic and Zil hospital in Moscow, after his August 10, 1998 accident, and then to North Kansas City Hospital and Heartland Regional Medical Center in St. Joseph, Missouri, and never having had surgery to his low back. He has been having physical therapy, which was recommended by Dr. Fishman, and continues with exercises that Dr. Hensons had given to him to this day. He continued treatment through the Health South program in January and February 1998, and merely had massages and shots after that in Nigeria and later at home. He also had "electrostim" from the chiropractors. He sees Dr. Hensons for his old back problem approximately once a week or twice a week for a general adjustment, sometimes treating him for a combination of low back, neck, shoulders and arms. Besides massages, he also does exercises for his low back. (T 119-128)

Referring to his client search logs, the first six pages of which involved his own search, it shows that after the August 1997 accident in Moscow, he started looking for work in August 1998, applying for jobs through "Find Work." He was still having pain when he finished his physical therapy program but was going to try to work. He did apply for work for every one of the jobs listed. This was followed by questioning on whether he understood the jobs he was applying for, and the work that would be performed, but he was unable to find work. (CX 15, T 130-134)

After December 31, 1998, he continued looking for work in the Trenton, Missouri area, which he did not find. So, after being contacted by a Mr. Bell from CSI, he decided to work in Nigeria for Coastal International for the embassies which had been under construction or renovation in 1994. (T 135-136)

Currently, he has been looking for any work, but wanted to remain in the local area. While Mr. Patterson disagreed with Mr. Fishman's findings at that time, he told prospective employers that his limitations were no lifting over 70 pounds waist to shoulder other than on an occasional basis; 60 pounds floor to waist on an occasional basis; 50 pounds floor to shoulder on an occasional basis; walking recommended to be limited to six hours total divided into three - hour segments, with 30 minute rest break in between these segments, and that he not perform any running activities. (T 135-143)

With regard to later job offers by Omniplex in Washington, D.C. and in Fort Wayne, Indiana in August 1998, Mr. Patterson confirmed that he turned them down because of factors other than pay. He stated that he did not want to leave Trenton, they were buying a home there, and there were other family reasons, but that he might have been capable of performing the jobs there as a security officer. He stated that he based the refusal on his feelings, his family's feelings, his family's wants, wages, location, and everything combined. (T 149-150, CX 18 and 19)

In going to work in Nigeria, he found the work to be easier in smaller areas, with rounds including two guards doing them together. It was also cleaner. He described his duties there and confirmed that he had to "confront the same risks that . . . [he] . . . was required to confront at Moscow, Santiago, and Helsinki, and every other location," but that the Omniplex location was a lot stricter than all the others he had been with at MVM and CIS. (T 145)

With regard to his heart attack in Nigeria, and the question about it being caused by the Nigeria job, he said that the stress of being overseas, away from family, and not being able to be there for his father-in-law when he had his stroke, together with the stress of the present "lawsuit", combined to cause his heart attack. He had not filed any claim against CIS for the Nigerian heart attack. He acknowledged that the back injury of August 1997 did not prevent him from doing any of his job duties or functions on the Nigerian job. (T 146-147)

When he returned from Nigeria after his heart attack, he did not start looking for work. He was carrying nitroglycerin pills that they issued him on July 4, 1999, when he had a second heart attack for which he was also hospitalized for four or five days at St. Luke's Hospital, Kansas City, Missouri. He was on blood thinning medication after his release, and now takes two aspirins a day, continuing on the blood thinners subsequent to July 1999. (T 151-153)

Mr. Patterson was injured while using a chain saw when he was hit by a falling branch from the tree. He testified that he was able to work with chain saws twice. (T 154) [No contrary evidence was introduced by the Employer.]

I find that Mr. Patterson's limited work with the chain saw does not establish that he could maintain work in excess of his work restrictions for an 8 hour day or 40 hour work week.

Mr. Patterson stated he has trying to find jobs at various locations and would try the work they would give him, including the Premium Standard Foods, which is a hog killing plant. (T 157-158) When asked about it, he stated that he would be sitting on the stand for nearly three hours, and after that he would have to stretch. When asked about his sitting time at the hearing he stated that he was about ready to fall over because the pain had increased so much, and his left leg was numb. (T 158)

On cross examination by the Director, he testified that he was given a collar that goes around his chest and his back, with two adjustable screws that came up to a chin piece, and to a back piece which was strapped together . (T 159) He wore the collar for approximately nine months. When he went to work, he was not under any work restrictions. (T 159) He only took aspirin for minor aches and pains. (T 160)

On redirect, he confirmed that on or about December 30, 1999, he attempted to have treatment by Dr. Pruitt, an orthopedic physician in Spencer, Iowa, to which the employer responded that it did not believe the treatment was necessary, so the treatment was disapproved.
(T 160-161; CX 33)

During the hearing, I had the opportunity to observe the actions and demeanor of the Claimant, both on and off the record. They were consistent with the evaluation of Dr. Ban, regarding his chronic low back condition, as was his testimony. I credit his testimony, and give it great weight, in particular in considering his exertional restrictions.

Testimony of Mrs. Patterson:

Mrs. Sandra Patterson testified she is a certified chiropractic assistant on a full time basis in Trenton, Missouri, and does part time massage.[4] She testified that Mr. Patterson had trouble getting out of bed in the morning. She described how he gets up, how he now walks with a limp, and only walks for certain periods of time, and then he has to sit down. Mrs. Patterson had experiences in interviewing for Video Technical Institute (at which point I terminated the questioning on the basis that claimant was attempting to qualify her as an expert, without notice to the Respondent/Employer). She confirmed that over the past two years Mr. Patterson's condition has deteriorated, observing that his problems after the head injury were with his memory and his head, rather than with low back problems. (T 163-167)

When he left for Moscow, it was their intention that he would stay the year and possibly a second year, to have enough money to come home to stay. When he came back home, she was able to observe his pain, why he grimaces his face, and inhale through his teeth and stretching, as manifestations of his back pain. (T 167-168)

Medical Evidence, Depositions and Related Reports:

After Mr. Patterson's injury on August 10, 1997, and his initial visit to the American Clinic in Moscow, Mr. Patterson was admitted to the Zil Hospital in Moscow, Russia on August 11, 1997, with the diagnosis of:

> intervertebrao osteochondrosis, spondylosis of the lumbosacral part of the spine, hernia of the intervertebrao disc, L5 - S1 with radicular pain symdrone, moderate paresis of the dorsal extensors of the left foot. (CX 1)

Upon his transfer to Heartland Regional Medical Center in St. Joseph, Missouri, on August 21, 1997, it was determined by CT scan and MRI, that he did have a herniated disc at the L5 - S1 level. Dr. Bruce T. Smith, M.D., suggested relief to leg pain and weakness on the left side by surgical diskectomy. Degenerative disc disease at L4-L5 with no herniation was also detected. Dr. Mujica signed off on the admission and noted both the spondylotic changes at L4-L5, L5 - S1 levels, and, in particular, that the left parasagittal in subarticular disc herniation in L5 - S1. He believed it was effecting the exiting left L5 nerve root. He noted patient had complained of left leg pain and numbness. Following this, patient's records indicate that the case manager from the insurance company stated that Mr. Patterson was to be transferred to Kansas City under the care of Dr. Ebelke. (CX 2)

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[4]After an offer of proof, on objection to the testimony of Mrs. Patterson regarding the effects on her life, and the actions of the employer's insurance carrier, him having to take another security job, the objection was overruled and Mrs. Sandra Marie Patterson was sworn in as a witness. (T 162-163)

Ultimately, Dr. Ebelke, at North Kansas City Hospital, examined Mr. Patterson, and diagnosed:

> lumbar strain/contussion, superimposed on multi level lumbar degenerative disc disease, with possible left L5 spondylolysis (unilateral, and borderline L5 - S1 spondylolisthesis. Mild left lumbar radicular syndrome (sensory only). (CX 3, p.1)

On August 30, 1999, Dr. Bruce recommended a conservative course of treatment involving medications and physical therapy, contrary to the prior recommendation of surgery. He stated: "I don't feel there is any urgency to proceed with surgery at this time, although he may eventually need surgery." He also directed further x-rays and work-ups on Mr. Patterson and noted that it was likely that he had spondylolsis and spondylolisthesis for many years. That, indeed, proved to be the eventual diagnosis. He suggested after an additional review of the MRI, that the L5 spondylolysis may be unilateral on the left side, and there may be some fibro cartio aginous buildup in the area as a possible source of left sided nerve root irritation. The further scans Drs. Crowley and McMannis performed indicated mild degenerative spurring changes at L5 - S1 with no acute process identified, with a negative whole body and lumbosacral spect bone scan. (CX 3; See also CX 4.)

Deposition of Dr. Ira Fishman:

Dr. Ira Fishman, E.O., received some training from the American Academy of Disability Evaluating Physicians but is not a member of it, and is not certified in it. (Fishman depo. p. 32) Dr. Fishman, in his initial report of November 17, 1997, on assuming Mr. Patterson's treatment from Dr. Ebelke, continued with four-hour daily work conditioning therapies for another week along with prescriptions for Relafen (CX 7; EX C, p. 42), and confirmed evidence of a chronic lumbo strain (sprain or strain) to his lower back with symptoms suggestive of some nerve irritation in his lower back. He testified that the degenerative disc disease pre-existed the accident of August 10, 1997. (Fishman depo. p. 8)

Dr. Fishman then saw Mr. Patterson on November 24, 1997, following the week of therapy, with the report that he did have unchanged persistent back pain, and noted that he did not complain of pain radiating down his legs. He felt that he had reached a plateau, and did not feel that further work conditioning was beneficial. Id. at 10. Instead, he referred him for a functional capacity evaluation (FCE) (EX C, p. 43-44). Dr. Fishman's report of December 15, 1997, recounts the results of the CFE stating that, in particular, Mr. Patterson is only able to tolerate walking for 2 hour segments at a time, up to six hours of walking total, however, he requires 30 minute breaks in between these two hour segments. He is also unable to perform "quick responses" running in pursuit of criminals on uneven terrain or up and down stairs. Lifting limits of 70 pounds waist to shoulder on an occasional basis, 60 pounds floor to waist on an occasional basis, 50 pounds floor to shoulder on an occasional basis were imposed and walking was limited to six hours divided into three segments, as stated above. He felt he would be able to assume his previous level of employment if he could find another job within those guidelines. (EX C, p.p. 45-46) (See Fishman depo. p.p. 12-13; EX V))

I find this analysis of Mr. Patterson's residual functional capacity to perform the duties of his Moscow guard duties to be incomplete with regard to the actual requirements for that position as described in the job description. (CX 25) In particular, Dr. Fishman did not consider the following: dragging or carrying an individual to safety; using hand to hand combat, stand or walk for 12 hour shifts. (CX 25, p.p. 1 & 2)

On January 26, 1998, Dr. Fishman did a final report again noting the lack of signs and symptoms of pinched nerve in the lower back, but with continuing evidence of chronic lumbosacral strain without evidence of radiculopathy. He felt he had reached his maximum medical improvement, as of that date and recommended he return to work within the limits as previously prescribed. (CX 6 p.p. 14-16; EX C, p. 49) I find that Dr. Fishman's failure to ask Mr. Patterson about pain in his legs between visits constitutes a major defect in his report, one that mandates that it be given limited weight.

On August 22, 2000, Dr. Fishman conducted a final exam at the request of the Respondent. At that time, Mr. Patterson stated that he was having more severe aching and cramping pain in his lower back and more severe and frequent pain radiation down the posterior aspect of his left leg to his left foot, associated with numbness and paresthesias in the left foot. The pain was making it difficult for him to sleep at night, and he was unable to sleep on his back. He used a pillow between his knees, with his knees flexed, in order to rest at night. He examined Mr. Patterson and found results consistent with those complaints, but indicative of chronic lumbosacral strain. This time he did find that symptoms of radiating pain involving the left lower extremity were suggestive of lumbar radiculopathy. He recommended a spine surgical reevaluation and verified his maximum medical improvement previously stated. (Fishman Depo. EX X, p.p. 17-20, EX C, p.p. 50-51)

In his deposition, Dr. Fishman confirmed that in referring to Claimant's Exhibits 1 and 2, the MRI's at St. Joseph, Missouri indicated posterior herniation of the disc at L5 - S1, as Drs. Smith and Mujica so found. Dr. Fishman confirmed that Mr. Patterson's initial complaints of pain radiation down the leg did improve with conservative treatment, but he also confirmed that from the prior exhibit, in reference to pain and numbness in the left leg, that there was a profound weakness in the planter flexors in his left foot, but strong, positive straight leg raising (lasegue's sign on the left and that he was showing numbness mostly on the lateral side of the left foot, with ankle jerk definitely diminished on the left versus the right.) With that he confirmed that Mr. Patterson was experiencing nerve root impingement at least before he saw him, which is called radiculopathy. He also confirmed by his January 26, 1998 diagnosis of MMI, that he gave him a 5 percent whole body impairment rating, with the same restrictions as above (Depo. at 29-32), but agreed with the point of Dr. Ban that with radiculopathy his rating of 10 percent whole body impairment would be correct. (Fishman depo. p. 13)

As stated above, the failure of Dr. Fishman to analyze the actual job requirements of the Moscow guard position in relation to Mr. Patterson's actual residual functional capacity even by his own restrictions, and the failure to consider his between visit radiculopathy raises severe restrictions or crediting his reports. Therefore, I give it only limited weight.

Deposition of Dr. Ban:

On or about September 20, 2000, Mr. Patterson had an evaluation by Justin L. Ban, M.D., F.A.C.S., certified independent medical examiner and fellow in the American Academy of Disability Evaluating Physicians. After reviewing the reports, as previously stated, from the time of his injury on August 10, 1997, along with the reports of chiropractic treatment continuing after Dr. Fishman's treatments by Dr. Hensons, three times a month, Mr. Patterson returned to work as a security guard in Postal International and was assigned to work in Nigeria. He had a sudden incident of chest pain. He was sent home for further evaluation and admitted to St. Luke Hospital in Kansas City on July 4, 1999, in the care of Dr. Thomas Good. He received cardiac care with the catheterization showing normal coronary arteries with CPK's mildly elevated. On August 31, 1999, he was readmitted to St. Luke's complaining of back pain following a close head injury. Dr. Ban incorrectly stated that he fell out of a tree, instead of a tree falling on him. CT scan showed thorough columnar spine fractures of the transverse process on the right, at L1 - L2, minimally displaced and neurological examination failed to reveal any focal neurologic defect. Further, in the examination of November 1999, Dr. Bottjen, Coastal Regional Center in Algona, Iowa, related chronic back pain since his injury on August 10, 1997. On further referral to Dr. Alexander Pruitt, an orthopedic surgeon in northwest, Iowa, plain films of the spine showed severe loss of disc space at L5/S1 and a MRI of the lumbosacral spine, third posterior disc bulge at L4/L5 extending into both foramen, causing the focal area of mild to moderate central stenosis and severe stenosis on the left neuro foramen. Also, an L5/S1 mild stenosis of the right neural foramen mild to moderate stenosis of the left neuro foramen was observed. (CX 26, p.p. 3-4)

Dr. Ban recounted Dr. Fishman's examination of August 22, 1997, in which he also found moderate tightness with tenderness to deep compression within the L4 and L5 paraspinal muscles bilaterally, finally leading to his conclusion that the tests involving the lower extremity are suggestive of lumbar radiculopathy. (Id. at p.4)

After examining Mr. Patterson's current symptoms and functional status, considering his occupational and pyscho-social history, and his medical history (which did admit the childhood neck condition), he diagnosed "degenerative disc disease with lumbar radiculopathy." He assigned a 10 percent whole person impairment, noting the previous 5 percent whole person impairment for the traumatic event of August 10, 1997. At the time, he had signs and symptoms of a chronic lumbar sprain with equivocal evidence of radiculopathy, followed by years of degenerative back disease, further deteriorating and now with objective signs of a recurrence lumbar radiculopathy. He found in his conclusions that based upon the information supplied, and to a reasonable degree of medical certainty, Mr. Patterson's employment with Omniplex was causally related to the August 10, 1997 injury; that it was a substantial material and permanent aggravating cause of his present back and leg problem; that Mr. Patterson had not been evaluated or treated for an emotional or psychological condition, although he may have such a condition, and as such could not be considered at maximum medical improvement, even in the event that mental or behavioral disorder exists; and finally that he has at least light work capacity, as defined in the Dictionary of Occupational Titles, U.S. Department of Labor. Light work is defined as exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently and/or a negligible amount of force constantly to move objects; the physical

demands are in excess of those for sedentary work. Light work usually requires a substantial amount of walking or standing, and Mr. Patterson has specific exertional limitations in that he should avoid repetitive climbing, kneeling, stooping, crouching, crawling, bending or twisting. His ability to walk and move about is limited to three hours in an eight hour work day. He can stand for three hours and sit for four hours in an eight hour workday. (Id. at 5-8; CX 26, p. 8)

On October 3, 2000, Dr. Ban gave a deposition which, by agreement of the parties and consent of the undersigned, was submitted into evidence post-hearing as Claimant's Exhibit 27. In his deposition, he reviewed the matters just discussed including prior medical reports. With regard to the initial reports from St. Joseph's on August 30, 2000, he stated that from reading the diagnoses that were present as a result of the MRI readings, it was his opinion that at the time the x-rays were taken and at the time the physical examination was conducted while he was at Heartland Hospital, that he had signs and symptoms of an acute lumbar radiculopathy, which is nerve root compression, as well as spondylitic changes at L4/L5 and L5/S1 areas of the spine, and a disc herniation at L5/S1 with protrusion of disc material with compressing of the nerve root. (Ban depo. p. 10-11)

Dr. Ban noticed that Drs. Smith and Mujica had recommended surgery at which point the Workmen's Compensation carrier requested transfer and treatment by Dr. Ebelke and ultimately Dr. Fishman, with a conservative course of treatment not involving surgery. Physical therapy was ordered, and steroid (cortisone) and other drugs were directed. Ultimately, a CFE was conducted (CX 5, p. 2), which showed a lifting restriction of 30 pounds. Dr. Fishman eventually came up with an impairment rating (CX 6), which was reviewed by Dr. Ban, and he determined that the restrictions stated by Dr. Ban of weight restriction of 70 pounds, while the functional capacity evaluation restriction was 30 pounds, was not consistent with the CFE. Fishman's assignment of the rating was on January 24, 1998, and he again saw Mr. Patterson in August of 2000, after which time (2 ½ years) there had been changes in his condition with a decline; his pain never really went away. Initially the pain improved significantly but over a period of months and years it gradually and progressively got worse again. After that he had an epideral block, which is a customary treatment for the condition, where disc material receded or drew back and was compressing the nerve root making it function at a higher level. In reviewing Dr. Fishman's August 22, 2000 report, he gives objective evidence that the condition had gotten worse with more severe and frequent pain radiating down the posterior aspect of the left leg to the left foot, associated with numbness and parastesia. (CX 6, p.p. 1-2) Examination of Mr. Patterson by Dr. Fishman was consistent with his complaints and with radiculopathy. (Ban depo. 12-17)

When Dr. Ban did his examination, the complaints given by Mr. Patterson were consistent with the prior evidence of low back injury, with both back and leg pain. His examination of the back itself was not particularly abnormal other than a decrease of range in motion and some tenderness, but there was no spasm. However, his neurologic examination of the lower extremities was important in that there was an abnormal sensory exam; in particular, decreased sensation for light touch and pin prick in the posterior lateral aspect of the left calf dorsum in the left foot, consistent with compression of the nerve root causing sensory changes. Subsequently, his diagnosis was degenerative disc disease with lumbar radiculopathy. Some of this in a normal person's aging would be related to degenerative and atomical changes. As a result of this, Mr. Patterson was given a 10 percent whole person impairment

rating based upon the AMA guides, as stated above, (Id. at 18-20; CX 26, p. 10) which I credit and to which I give great weight.

Dr. Ban testified that he did not have a serious quibble with Dr. Fishman's impairment rating at that time, but that, at the present time the impairment rating differs. Dr. Ban explained at the time the signs for serious radiculopathy were not present and to the extent that they were, it was reasonable to give him the rating that he did and to find that he had a maximum medical improvement as of January 26, 1998. Subsequently, he noted, Mr. Patterson's back condition changed, feeling better after treatment and then worsening with spur formation osteophytes and changes in the bone and lower lumbar spine region. This takes years to develop, even from aging changes, and has the potential for compressing the nerve root again over a period of time. He gave him a more detailed explanation of this degeneration, demonstrated by the life cycle chart. (CX 29; Id. at 21-23) (CX 29 - 32 are attached to Dr. Ban's deposition and are accepted into evidence as such. CX 33 was also submitted and accepted into evidence.) After his explanation of the degenerative change, Dr. Ban stated that the accident of August 10, 1997, was direct and precipitated a whole cycle of events that led to Mr. Patterson's current condition, and his 10 percent impairment is based upon the radiculopathy. (Id. at 23-28)

Dr. Ban went on to explain that while Mr. Patterson was recovering from his acute injury, he was given a 5 percent whole person impairment which he believes is appropriate, and since the report was rendered, the condition has changed due to pathological and antonomical changes which he just reviewed. As a result, the fact that he has evidence of the recurrent radiculopathy, his impairment is not the 5 percent that Dr. Fishman gave him, but is the 10 percent impairment rating, or 5 percent over what Dr. Fishman gave him. (Id. at 29)

When asked what happens when one superimposes trauma upon a pre-existing degenerative back condition, he stated that depending on the nature of the trauma, the potential exists to make it worse. Because of his age, and since he didn't have a normal back, what is important is that there were not many symptoms from the underlying condition. So it is really a diagnosis you could make on the basis of an MRI in populations of normal asymptomatic people. Here, they would know that people like Mr. Patterson would have a change, but these are normal changes due to aging. Reviewing Mr. Patterson's restrictions, this would mean that he can lift and carry 20 pounds occasionally, and 10 pounds frequently, with other restrictions and repetitive climbing, kneeling, stooping, bending, crawling or twisting, and his ability to walk and move, limited to three hours in an eight hour work day. He can also stand for three hours or sit for four and he believes that this condition is now permanent. Based upon his age, and the fact that he had his condition for a long time, it is more likely than not that his functional level will not improve, even with further treatment. Dr. Ban stated that his opinions here were based upon a reasonable degree of medical certainty, and that they were related to his August 10, 1997 accident. (Id. at 30-32)

On cross examination, Dr. Ban was initially asked whether he believed that Mr. Patterson had obtained maximum medical improvement at that time. In conjunction with his back injury, he stated that he was "MMI for his acute injury," stating that it is more likely than not that he would not improve substantially. He believed this to be the case even with surgery. (Id. at 33)

He clarified that this MMI referred to his physical condition, his muscular, skeletal problem, but not to his mental condition. Clarifying his statement about being able to walk and move about for three hours in an eight hour work day, relating that to being able to having to walk for 15 minutes per hour, he stated that it would be fair to say that he is able to ambulate for 20-30 minutes at one time without stopping, at which time he would have to take a break. He stated that he would also be able to drive for an hour. (Id. at 35-39) Dr. Ban conceded that there was a difference between lifting and carrying when there is a reference to 30 pounds for carrying and 70 pounds for lifting. (Id. at 40)

With regard to Mr. Patterson's 1960's injury involving his neck at wrestling practice, he referred to in ER EX 0, p.p. 112-114, he stated that the relative condition could constitute a pre-existing permanent partial disability to the cervical spine. (Id. at 48; CX 27 at p. 48) He did state that there is no direct correlation between cervical spine injuries and lumbar spine injuries. He responded to the question of whether the two could operate together to constitute a pre-existing permanent partial disability by saying that he did not know the nature of what his cervical spine injury was as a youngster. He stated that Mr. Patterson might have had a sprain, a simple soft tissue injury, or he might have actually had a fracture. If he had a fracture of the cervical spine, he could see where this could cause a potential problem for the cervical spine, but did not know how it would affect his lumbar spine. Rephrasing the question, Dr. Ban was asked whether Mr. Patterson's permanent impairment might not be due solely to the August 10, 1997 injury. He responded that he would have to look at the medical records prior to the injury in August 1997 to see whether there were any objective abnormalities of his back, such as loss of reflexes, sensory changes, motor changes, redicular pain, etc. From his review, he did not see any of that. (Id. at 49-52)

I find that due to Dr. Ban's superior qualifications, and the failure of Dr. Fishman to consider Claimant's continuous radiculopothy, which I find existed at the time of Claimant's examinations by Dr. Fishman even though Mr. Patterson did not state so due to medications, and the failure of Dr. Fishman to ask, that Dr. Ban's opinion should be credited and given more weight. I also find that his whole body rating of 10 percent extends backward in time through at least the January 26, 1998 opinion of Dr. Fishman, which should be considered his true date of maximum medical improvement.

Deposition of Ron H. Combs, Vocational Rehabilitation Specialist:

Mr. Ron H. Combs, E.D. S., testified that he was a rehabilitation specialist for Intracorp for about 10 years, working primarily with injured workers or underemployed workers, doing vocational assessments, labor market surveys, return to work training, planning, and job research.

From April 14, 1998 through August 3, 1998, Mr. Combs performed a labor market survey regarding Mr. Patterson's Workers' Compensation case, and had the opportunity to view his medical records. (EX Y, Combs depo. p. 6) For this he had a report from Dr. Fishman, the report that was submitted to the employer. Ibid. (EX E, p.p. 57-59) He also did a supplemental report. (Id. at p.p. 60-63) He reviewed information about Mr. Patterson's education, work history, interests, thoughts on return to work and medical restrictions. The geographical limits were a 50 mile radius of Trenton, Missouri, Mr. Patterson's home. This had to do with driving time of about an hour as of a maximum amount of driving time to go to and from work. (Id. at 7) With this they identified certain employers using the Missouri Works internet websites and the internet researching employers that existed within the area, and newspapers. He called employers and would ask if they knew of anyone else hiring in the area to get referrals. (Id. at 7-8) He got positive responses on Mr. Patterson's history and his restrictions. He would ask whether they had any openings or if they expected to have some in the near future; if he got positive responses from that he would tell them about Mr. Patterson, a person with a lot of skills, successful work history, and emphasizing that there would be restrictions. He would state that the job requires the employee to walk in the area or state the limitation to determine if he could be accommodated. To this, he did a labor market survey report. (EX F, p.p. 64-66) A few jobs involved openings at Omniplex, one in Indianapolis and the other in Washington, D.C. (Id. at 12) Mr. Combs went to Mr. Patterson's home and discussed them with him, to determine if they fell within the work restrictions that he had been given, which were those from Dr. Fishman. When asked if he would have accepted either one of them, he indicated "no," that he would not because he did not want to leave Trenton, and he felt that they were not sufficient to cover the cost of moving or relocating. (Id. at 13)

On cross examination, CX 14 was referred to as a list of jobs that Mr. Patterson had the physical capacity to perform, that were available at that time, in existence in July or August 1998. When asked whether they were actually available for someone to walk into them and be hired, Mr. Combs said yes, but if Donald Patterson applied for the job, and the Employer was going to turn him down, then they were not actually available to him. Mr. Combs testified that he would not agree that the jobs were not available to Mr. Patterson. He would agree that they would be available to him, if in the process of application, interviewing or whatever, something else happened that doesn't mean the job wasn't available. The jobs included 10 jobs which were averaged to come up with $6.71 per hour, with which Mr. Patterson did not disagree. (Id. at 15-18)

Mr. Combs verified that he used Dr. Fishman's restrictions with a few changes such as the one hour for the 50 mile driving time, to accommodate what he could do, but otherwise he used Dr. Fishman's limits as a base. He did recognize that Mr. Patterson's conditions could have deteriorated over the past two years, and his restrictions might have increased, which could affect the issue of whether he could perform the jobs. Before that, however, they had field jobs that would be available. He also agreed the pay was lower than what would have earned if he had not had the restrictions. Mr. Combs confirmed that he had not reviewed benefits that were available to the jobs in question. (Id. at 24-25)

Since the vocational assessment report of Mr. Combs is based upon the erroneous criteria of Dr. Fishman insofar as his diagnosis of no radiculopothy is concerned, I find that Dr. Combs' conclusions about available work is tainted by that incorrect information and may be given no weight.

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant/witnesses, I make the following:

Findings of Fact and Conclusions of Law

Initially, the Employer presents three issues concerning: (1) The calculation of Claimant's average weekly wage (AWW); (2) The nature and extent of Claimant's causally related disability; and (3) Its entitlement to Section 8(f) relief. I will deal with the nature and extent of Claimant's disability first, and then evaluate the calculation of his average weekly wage and the entitlement of Omniplex to Section 8(f) relief.

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Strachan Shipping Co. v. Shea**, 406 F.2d 521 (5th Cir. 1969), **cert. denied**, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. **Voris v. Eikel**, 346 U.S. 328 (1953); **J.V. Vozzolo, Inc. v. Britton**, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. **Durrah v. WMATA**, 760 F.2d 320 (D.C. Cir. 1985); **Champion v. S & M Traylor Brothers**, 690 F.2d 285 (D.C. Cir. 1982); **Harrison v. Potomac Electric Power Company**, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. (See, 33 U.S.C. §920(a)). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that a "**prima facie**" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/ Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/ Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his or her body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the present case, Claimant alleges that the harm to his bodily frame, was a result of the fall at the Moscow Embassy warehouse when, two weeks after reporting there, he tripped over rebar protruding from the newly poured concrete, resulting in a low back injury and continuous pain, from which he is permanently and totally disabled. The Employer has stipulated to the basic injury, its work relatedness and effects on his low back, and has not introduced independent evidence severing the connection between such harm and Claimant's employment. However, it has addressed questions

concerning other matters that deal with the nature and extent of that injury.[5] Claimant has clearly established a *prima facie* claim that such harm is a work-related injury, as shall now be discussed.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

Pain and limitations from Claimant's pain have been well described by the witnesses, and well documented by the Claimant and those who continuously saw him as medical professionals, since his 1997 injury.

Respondent utilizes the deposition testimony and records of Dr. Fishman as the treating physician in an attempt to defeat aspects of Claimant's claim on the nature and extent of the injury, and to draw the conclusion that after February 17, 1999, Claimant was not disabled, to the exclusion of Dr. Ban's evaluating testimony, without even mentioning or evaluating it in its brief, and even though Dr. Ban, I find, enjoys superior credentials to those of Dr. Fishman since Dr. Ban is certified by the American Academy of Disability Evaluating Physicians and Dr. Fishman is not. In fact, the Employer's brief never mentions the fact that Dr. Fishman was, in the final analysis, a referral physician through the employer's (and the Employer's insurance Carrier's), chain of approved medical care, after they had

[5]In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989).

rejected, and refused to pay for the recommendation of Claimant's physicians, Drs. Smith and Mujica, for surgery, and then forced the Claimant to adopt a more conservative line of therapy and medication by refusing to pay for the surgery.

Dr. Fishman diagnosed a permanent partial impairment related to Mr Patterson's lumbosacral sprain, without evidence of radiculopathy. He gave Mr. Patterson a 5% whole body rating as of his MMI date of January 28, 1998, and found that, Mr. Patterson's lifting restrictions were 70 lbs. waist to shoulder other than on an occasional basis, 60 lbs. floor to waist on an occasional basis and 50 lbs. floor to shoulder on an occasional basis; his walking restrictions were 6 hours total divided into 3 hour segments, with 30 minute rest breaks in between the segments; that he could not pursue suspects or engage in any running activities; and that he could engage in no work involving climbing, kneeling or twisting.

The original diagnoses all showed radiculopathy into Mr. Patterson's left leg. Even Dr. Fishman himself finally confirmed in his August 22, 2000 report, that Mr. Patterson had "more severe aching and cramping pain in his lower back and ... more severe and frequent pain radiation down the posterior aspect of his left leg to his left foot associated with numbness and paresthesias in the left foot." He went on to describe Mr. Patterson's difficulty sleeping at night, requiring pillows between his legs. The very wording on Dr. Fishman's August 22, 2000 report "more severe aching and cramping" indicates the extent of the existing radiculopathy condition that had persisted before that date. What was happening in between August of 1977 to August 2000? The failure of Dr. Fishman to pursue questions about leg pain between visits with Mr. Patterson when he would report low back pain on a visit, but not mention pain in his leg due to present effective medication, warrants giving less weight to Dr. Fishman and more to Dr. Ban. I find that the existence of radiculopathy was not a new condition at the time of Dr. Ban's examination and evaluation, but that it continued in varying degrees and was affected by medications throughout the time period of Claimant's recovery and through the date of the hearing.

This is particularly the case when the evaluations by Dr. Ban clearly showed the left leg problem as one of continuing pain radiating into his left leg, which was supported by the herniated disc MRI's that accompanied Dr. Ban's examination. This failure has compelled me to give Dr. Fishman's evaluation of Mr. Patterson less weight than that of Dr. Ban.

Since Dr. Ban's deposition testimony of the evolution of the type of back injury and radiculopathy suffered by Mr. Patterson, as initially improving and thereafter getting worse, is well documented and given more weight, I credit his September 1999 report and his assignment of a 10% whole body disability rating to Mr. Patterson with light work capacity restrictions, which I adopt in full. It includes exertional limitations of 20 lbs. of force occasionally, and up to 10 lbs. of force frequently, and/or negligible amounts of force constantly to move objects. I find that these light work limitations are the governing limitations to the Claimant from January 26, 1998, his date of maximum medical improvement, through the date of the hearing, and that, as a result he could not have performed the duties of security guard for the Employer, or certain other duties of employment suggested by the Respondent/Employer.

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

It is my opinion that Claimant has established a *prima facie* case of total disability from his Omniplex Moscow security job position since his restriction to the performance of light duty jobs would not permit him to perform the duties of the Moscow position.

Disability: Wage Earning Capacity/Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.. Addressing the issue of job availability, the Fifth Circuit, in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981), has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure? (Id. at 1042.)

Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992). However, the employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Company*, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane*, 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

The employer must establish suitable alternative employment within Claimant's local community. *Turner*, at 1042-1043. While local community has been interpreted to mean the community in which the injury occurred, *Jameson v. Marine Terminals*, 10 BRBS 194 (1979), it permits an employee to move for legitimate reasons and to then confine the search to that community. Here, Claimant's Moscow employment agreement was terminated by his inability to perform employment services in Moscow and Trenton. Missouri was his legitimate residence, and therefore, his local community.

The Board has held that available job positions sixty-five and two hundred miles from the claimant's residence are not considered within the local community, even if the claimant took such jobs before the injury occurred. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978).

The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available. *Turner*, at 1043; *Hoey v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). The claimant must establish a willingness to work. *Turner*, at 1043. If a claimant testifies that he diligently tried to obtain a job identified by employer, but his efforts have been futile, the claimant has sustained his burden. *Roger's Terminal & Shipping v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986). The claimant must reasonably cooperate with the employer's rehabilitation specialist and submit to rehabilitation evaluations to establish a reasonable diligence at attempting to secure employment. *Vogle v. Sealand Terminal*, 17 BRBS 126, 128 (1985).

An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). Claimant must cooperate with Employer's re-employment efforts, and if Employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider Claimant's willingness to work. *Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 102 (1985).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. *Rinaldi v. General Dynamics Corporation*, 25 BRBS at 131 (1991). In so

concluding, the Board adopted the rationale expressed by the Second Circuit in *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991), that maximum medical improvement "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that, ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." *Id*.

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21)(h); *Richardson v. General Dynamics Corp.*, 23 BRBS (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. *Cook*, 21 BRBS at 6. Subsections 8(c)(21) and 8(h)of the Act, 33 U.S.C. §908(h), require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 7.2d 319 (D.C. Cir. 1986); *Bethard v. Sun-Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980).

In *White v. Bath Iron Works Corp*., 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." *White*, 812 F.2d at 34. Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that this is not sanctioned by section 8(h).

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, Employer must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), Employer's counsel must identify specific, available jobs; labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981).

Section 8(h) provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). In determining whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225,18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).

Basically, Omniplex maintains that Mr. Patterson's job market as a security guard is world wide; that his performance of security job work post-injury demonstrates that there is such work that he can perform, and that there are other available jobs that establish his wage earning capacity.

It is my opinion that Mr. Patterson's job market is within the labor market of the community of Trenton, Missouri, and that it is no more than 50 miles from the center of Trenton, Mo., that this geographical limitation excludes the City of Chillocothe, Missouri, which is 65 miles from Trenton; that under the above cited case law**,** the two jobs offered to Mr. Patterson by Omniplex at $6.40 per hour in Indiana and $11.20 per hour in Washington, D.C., notwithstanding the loss of his home and his wife's job, as well as lack of travel and expense money for the moves, or other benefits offered by Omniplex at Moscow, conferred no obligation on him to accept those positions which were well beyond the 50 mile radius; that this did not affect his lack of available work; that they did not otherwise dictate that there were any such available jobs within the community, and that they certainly did not establish his wage earning capacity in the Trenton area.

While Mr. Patterson's testimony establishes that he performed the Nigerian security job satisfactorily at $10.50 per hour for Coastal International from February 1999, until April 1999, and at $12.50 per hour when Heritage took over, until his heart attack, there has been no evidence presented that there was a similar guard position available in the Trenton, Missouri, labor market community that would a have accommodated his restrictions, or that these rates established his wage earning capacity in Trenton, Missouri for similar positions, if any.

Dr. Ban's restrictions as stated on September 20, 2000, as of his examination of August 22, 200, (CX 26) stated that:

> The examinee has at least a light work capacity as defined in the *Dictionary of Occupational Titles, U.S. Department of Labor*. Light work is defined as exerting up to 20 pounds of force occasionally and/or up to 10 pounds of

> force frequently and/or a negligible amount of force constantly, to move objects. Physical demands are in excess of those for sedentary work. In addition, the examinee has specific exertional limitations in that he should avoid repetitive climbing, kneeling, stooping, crouching, crawling, bending or twisting. Ability to walk and move about is limited to three hours in an eight hour work day. If he can stand for three hour work day and sit for four hours in an eight hour workday. (CX 26, p.8)

In addition, the labor market survey and the addendum of Mr. Combs concerning other proposed, available work (CX 14; EX E) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of the jobs cited by Mr. Combs in relation to Dr. Ban's restrictions, which I find to have been in effect prior to Dr,. Ban's own report. This is due to the failure of Dr. Fishman to include Mr. Patterson's continuing radiculopathy condition as the factor separating the basis for the two opinions, and Dr. Ban's reliance on this erroneous factual assumptions whether such work is within the his physical restrictions which were incorrectly stated to not include the effects of radiculopathy.

Thus, this Administrative Law Judge has a very limited and incomplete idea as to what are the duties of a job at the firms identified by Mr. Combs or the specific duties of the other jobs identified based upon his actual restrictions.

In view of the foregoing, I cannot accept the results of the labor market survey because, without the required information about each job in connection with the correct restrictions, I am simply unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, suitable alternative employment or realistic job opportunities. In this regard, see *Armand v. American Marine Corp.*, 21 BRBS 305, 311, 312 (1988); *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987).

In short, none of these have changed my opinion that, considering claimant's age, background, education and experience, even though, following his injury, he might be able to physically and mentally do some of the duties of the security jobs that he had done before his injury, that he could not have performed all of those security job duties, and there <u>are</u> no similar jobs reasonably available in the community for which the claimant is able to compete, and for which it is reasonable and likely that he could secure them.

<u>Average Weekly Wage</u>:

Assuming that Claimant is entitled to benefits, what Omniplex proposes to do next, is to use Claimant's 1995-1996 pre-injury, foreign security guard service rate of pay in Helsinki, Finland, to determine Claimant's AWW under Section 10(c) of the Act on the basis that Mr. Patterson had an insufficient number of weeks of employment at the US Embassy Warehouse

under construction in Moscow, Russia to constitute "substantially the whole of the year preceding the injury" under that contractual rate of pay under Section 10(a) of the Act, together with its proposal that there is otherwise insufficient information to make a calculation under that section. It then proposes to use only his actual pre-injury security guard pay in Helsinki, Finland, to calculate his AWW, and his post -injury employment in Nigeria to calculate his wage earning capacity under Section 8(h) of the Act. (Er. Br. pp. 10-15)

Section 10 of the Act governs the calculation of the Claimant's average weekly wage (AWW) upon an award of benefits, for the purpose of the calculation of the actual amount of those benefits. The calculation is made by reference to the applicable subsection, (a) through (c) of Section 10 to determine the Claimant's total annual wages, and that amount is then divided by 52 and multiplied by 2/3rds to determine his AWW.

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148, 156-57 (1979).

The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). *See also Brien v. Precision Valve/Bayley Marine*, 13 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 183 (1984). The Board has held that 34.4 weeks of wages do constitute "substantially the whole of the year," *Duncan*, 24 BRBS at 136, but 33 weeks is not a substantial part of the previous year. *See Lozupone*, 12 BRBS at 156 (citing *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

Here the Employer maintains that Claimant had an insufficient number of weeks of employment (2 weeks, disregarding his contractual agreement from July 1996 and his training in April 1997), to calculate his AWW under Section 10(a), so that the reference for Claimant's AWW calculation must be to either Section 10(b) or 10 (c).

Where Section 10(a) is inapplicable, application of Section10(b) must be explored before resorting to application of Section10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured

employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his/her injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir.1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Section 10(b) directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury in the same or similar employment in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8BRBS 692 (1978); *Sproull v. Stevedoring Servs. of America*,25 BRBS 100, 104 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135 (1990); *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

The second method for computing average weekly wage, found in section 10(b), cannot be applied, according to Omniplex, because of the paucity of evidence as to the wages earned by a comparable employee. *Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 698 F.2d 743 (5th Cir. 1983), *rev'g on other grounds*, 13 BRBS 862 (1981), *rehearing granted en banc*, 706 F.2d 502 (5th Cir. 1983), *petition for review dismissed*, 723 F.2d 399 (5th Cir. 1984), *cert. denied*, 469 U.S. 818, 105 S.Ct. 88 (1984). Since Section 10(a) is applicable, no evidence under Section 10(b) is necessary.

Whenever Sections 10 (a) and (b) cannot "reasonably and fairly. be applied," Section 10 (c) is applied. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Gilliam v. Addison Crane Company*, 22 BRBS 91, 93 (1987). The use of Section 10 (c) is appropriate when Section 10 (a) is inapplicable and the evidence is insufficient to apply Section 10 (b). *See generally Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978). Omniplex uses Section 10(c) under the assumption that Section 10(a) does not apply. As stated above, 10(a) does apply, so resort to 10(c) is unnecessary, and is therefore, not analyzed.

I find that even though the Board has recognized a dividing line between 33 weeks and 34.4 weeks, with the latter constituting a "substantial" part of a year that Claimant worked for Employer for qualification, while the 33 weeks do not, the presupposition of Omniplex is that Mr. Patterson could have actually earned other wages during all 260 days of that previous year, and that he was not prevented from so working by its "varying daily needs," or the "theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the

computation" set forth above, which must also contemplate a contractual arrangement that preceded the time actually worked by the Claimant in this case.

It is my conclusion that Claimant operated under the terms of an employment agreement with Omniplex from sometime between July 18, 1996, when he was offered a position with Omniplex and was directed to return the enclosed, signed agreement effective September 18, 1996 through September 18, 1998 ASAP, and his receipt of the deployment letter dated September 16, 1998, from Cecil Turnbow, Captain of the Omniplex Guards in Moscow, Russia. Even though a copy of the initial, signed agreement has not been made a part of this record, it is my conclusion that this deployment letter constituted an acknowledgment that the agreement had been signed and returned to Omniplex as directed, that Omniplex was confirming its agreement with those terms and conditions of employment in that agreement and the cover letter to which it was attached, and that, therefore, an employment agreement between Mr. Patterson and Omniplex was in effect at least as of that date.

It is also my conclusion that when Claimant reported for training on April 3, 1997, (T 107) pursuant to the terms of the July 18, 1996 cover letter to that agreement, that this constituted a partial performance of those terms and conditions of employment, giving further evidence of the agreement and verifying the additional obligation to be available for deployment upon two weeks notice, thus limiting his opportunities to accept other permanent employment elsewhere during that time period until he was deployed. (CX 21, pp. 3-4)[6]

The fact that Omniplex kept Mr. Patterson on a contractual standby of 29 weeks, until the beginning of his training on April 3, 1997, and then for an additional 12 weeks or so more until he reported to Moscow subject to a two week notice for actual deployment, constituted evidence that those weeks were related solely to "the employer's varying daily needs," and may not be deducted from the time of service evidenced by the initial agreement. Mr. Patterson's employment obligation was, therefore, solely to the Omniplex/United States Embassy guard position in Moscow, at a specific location with a top secret clearance, that was being completed while he was under contract without pay, but at a contractual rate of pay of $14.57, which was his value to them, throughout the time period. In my opinion, this constituted such "time lost due to" an event related to the employer's daily needs.

Therefore, I find that the weeks actually credited to Mr. Patterson's employment within a year prior to his injury for Omniplex, must include all of those weeks from the effective date of his employment contract, from September 16, 1996, (CX 21) through the date of his last pay period, August 10, 1997, or 49 weeks, as "substantially the whole of the year

[6]The fact that Mr. Patterson later signed another agreement on July 28, 1997, for the period of July 28, 1997 through July 27, 1999, did not alter the terms of that prior employment agreement prior to its effective date.

preceding his injury," and the starting point for determining Mr. Patterson's AWW as his hourly rate of pay of $14.57, under Section 10(a) of the Act.

I also find, however, that there is insufficient evidence on the record to conclude, with only two weeks of work, that his regular work week would have consisted anything other than a five day work week, at 40 hours per week. Therefore, I find that Mr. Patterson's average weekly wage is calculated at $14.57 per hour X 40 hours, to be $582.80, 2/3 of which is $388.77.[7]

In addition, I find that Mr. Patterson's wages in Nigeria of $700.00 per week are not representative of his wage earning capacity in Trenton, Missouri, where the provisions of Section 8(h) of the Act must be applied.

Section 8(f) Relief:

The Special Fund was established in 1927 with the enactment of the LHWCA. It was created by 33 U.S.C. § 944, and was intended to spread liability for injuries sustained by employees with pre-existing conditions equally among all employers in the maritime industry.[8]

> The Special Fund was originally enacted . . . to fund expenditures [where] an employee received an injury which alone caused only permanent partial disability, but resulted in the employee's permanent disability when combined with a previous disability, the employer had to provide compensation for the disability caused by the second or subsequent injury. . . . [T]he employee would be paid the reader of his compensation for permanent total disability out of the Special Fund . . .

Smith, *The Special Fund Under the Longshore and Harbor Workers' Compensation Act*, 11 Mar. Law 71 (1986). [taken from *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, Case No. 96-3648 (3d Cir. July 29, 1998).]

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

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[7]In so doing, I specifically reject the calculation proposed by the employer that I utilize Mr. Patterson's Helsinki pay to establish his AWW at $453.12 under Section 10(c)of the Act, as being the inappropriate subsection to apply since there is sufficient evidence of his earnings for the time period.

[8]Contribution to the Special Fund is mandatory for all maritime industry employers. Annual assessments are determined using the ratio of the employer's compensation payments under the LHWCA to the total compensation paid by all employers under the LHWCA. 33 U.S.C. § 944(c)(2).

(1) The injured worker had an existing permanent partial disability before the most recent injury;
(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and
(3) Depending on whether the present disability is total or partial,
(a) if the present permanent disability is total, it is not due solely to the most recent injury; or
(b)if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the preexisting permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director. OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, *see Director, OWCP (Bergeron) v. General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992); *Luccitelli v. General Dynamics Corp.*, 964 F.2d 1303(2d Cir. 1992); *CNA Insurance Company v. Legrow*, 935 F.2d 430(1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. *See Director, OWCP v. General Dynamics Corp. (Bergeron), supra*.

In the present case, it is my opinion that none of Claimant's prior injuries or treatments were such that the prerequisites of Section 8(f) were met. Whatever the nature of Mr. Patterson's childhood neck injury, it was completely resolved by his adulthood, and could not have affected, or been affected by his new back injury. It is my opinion that neither the employer nor its physicians have submitted substantial documentary evidence to establish any sort of a back injury or condition meeting the conditions of the above first condition that would have affected his 1997 back injury in Moscow. I therefore find that, if the present permanent disability is total, it is due solely to the 1997 injury; and if the present permanent disability is partial, it is not materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of any preexisting condition. This opinion is verbified by Dr. Ban, and I give greater weight to his testimony.

Claimant's permanent total disability has, therefore, been clearly established, and she is entitled to the appropriate benefits under the Act. The Employer is not entitled to Section 8(f) relief.

The Responsible Employer:

Omniplex World Services, Inc. was the employer with whom he had his most recent period of cumulative qualifying employment, and, is therefore the properly designated responsible employer, herein.

Attorneys Fee:

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer or Carrier. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondent's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer shall pay to the Claimant compensation for his temporary total disability from August 16, 1997 through January 26, 1998, based upon an average weekly wage of $582.80, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on January 26, 1998, and continuing thereafter, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $582.80, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 10, 1997 injury. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein, if any.

4. The Respondent shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel who shall then have fourteen (14) days to comment thereon.

A
THOMAS F. PHALEN, JR.
Administrative Law Judge